



**DECISION REGARDING PROPOSED SETTLEMENT
AGREEMENT**

IN THE MATTER of an application by Irving Oil Marketing
G.P. and Irving Oil Commercial G.P. for an increase in the
wholesale margins for motor fuels and heating oil
pursuant to section 12(1) of the Act and section 9(1) of
the Regulation

December 10, 2012

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER of an application by Irving Oil Marketing G.P. and Irving Oil Commercial G.P. for an increase in the wholesale margins for motor fuels and heating oil pursuant to section 12(1) of the Act and section 9(1) of the Regulation

NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

VICE-CHAIRMAN: Cyril Johnston

MEMBERS: Don Barnett
Roger McKenzie

SECRETARY: Lorraine Légère

COUNSEL: Ellen Desmond

APPLICANT:

Irving Oil Marketing G.P. / Irving Oil Commercial G.P. Len Hoyt, Q.C.

PARTICIPANTS:

Co-op Atlantic	Peter T. Zed, QC
Department of Energy & Mines	Sacha Patino
Magnetic Hill Esso	Jason Lutes
Wilson Fuel Co. Limited	Christopher Stewart
XTR Energy	Ken Wootton
Public Intervenor	René Basque

Irving Oil Marketing GP and Irving Oil Commercial GP (applicant) applied on June 5, 2012 to the New Brunswick Energy and Utilities Board (Board) for a change to the maximum margin that may be charged by a wholesaler for motor fuels and heating oil. The application is brought pursuant to section 12 of the Petroleum Products Pricing Act (PPP Act).

The hearing of the application was scheduled to begin on December 5, 2012. On November 30 the Board was advised by counsel for the applicant that settlement discussions had taken place between the applicant and the Public Intervenor and that they wished to postpone the commencement of the hearing to December 17 and to attend before the Board on December 5 to seek direction on how to proceed regarding the settlement. The Board agreed to proceed as requested and the parties appeared before a panel of the Board on December 5.

Many regulatory boards across Canada have put in place rules to encourage and facilitate the settlement of issues and entire applications. A settlement supported by well-informed parties representing all stakeholders can result in a more efficient regulatory process and savings of time and money.

This the first time the Board has been asked to consider the settlement of a full application.

The Board expects that many consumers may be wary of the settlement process. Members of the public may not appreciate that, unlike a court case, by the time the oral public hearing begins approximately 80% of the hearing process has already occurred. In the present matter the applicant has filed extensive evidence with the Board and has been required to answer in writing many questions (interrogatories) posed by Board staff and the Public Intervenor. Expert evidence was filed by the Public Intervenor and this evidence has also been subjected to written questioning. The applicant has filed rebuttal evidence.

The Board members considering the proposed Settlement Agreement have reviewed the substantial amount of evidence filed and are well positioned to conclude whether or not the proposed Settlement Agreement is in the public interest and meets the legislative objective set out in section 1.1 of the PPP Act that “*consumers should benefit from the lowest price possible without jeopardizing the continuity of supply of petroleum products*”.

Prior to December 5, the only parties who were aware of the terms of the proposed Settlement Agreement were the applicant and the Public Intervenor, who were the negotiators of the agreement. The Board commenced proceedings on the morning of December 5 and set out a process for addressing the proposed settlement. The panel adjourned to give the applicant and the Public Intervenor the opportunity to review the

proposed Settlement Agreement with the other parties and seek their consent. Board staff did not participate in the discussion dealing with the proposed settlement terms.

In the early afternoon of December 5, the Board was presented with a proposed Settlement Agreement, consented to by the applicant, the Public Intervenor, Wilson Fuel Co. Limited and XTR Energy Company Limited. Correspondence from the intervenor Co-op Atlantic was provided to the Board indicating that they were not active in the application but simply observing. The intervenor Magnetic Hill Esso did not attend the proceedings but had previously advised the Board that its position was also one of an observer rather than one of an active participant.

The Department of Energy and Mines is a registered intervenor in this matter. A representative of the Department was present at the hearing, but did not participate in the discussions leading to the proposed Settlement Agreement. The representative advised the panel that he was merely attending as an observer and that the Department was taking no position on the matter.

The proposed Settlement Agreement contained a provision that the margin on regular grade gasoline would vary depending upon the method used by the Board to set the benchmark for that product for a particular price setting period.

Some background information is necessary to understand the proposed Settlement Agreement.

The Board sets maximum prices for four different types of motor fuels: regular grade gasoline, mid-grade gasoline, premium grade gasoline and ultra-low sulphur diesel fuel. An essential part of setting these prices is the determination of a benchmark price for each type of fuel. The benchmark price for each type of fuel is determined through the use of published prices for various relevant base products. The source of these published prices is established by regulation.

The calculation of the benchmark price for regular grade gasoline differs from the calculation for other motor fuels. For regular grade gasoline the Board is directed by regulation to calculate two different benchmark prices and to use the higher of the two for the purpose of setting the price for regular grade gasoline. Specifically the Board calculates a benchmark for conventional gasoline and a benchmark price for E-10 gasoline. The base product used for calculating the price of conventional gasoline is conventional unleaded 87 octane gasoline. E-10 gasoline is a mixture of 10% ethanol and 90% CBOB and those components are used as the base products to calculate the E-10 price. CBOB is a lower octane conventional gasoline that is blended with ethanol to produce E-10 gasoline, which is a regular grade gasoline with an 87 octane rating.

The Board discussed with the parties at the hearing whether the Board had the statutory authority to approve this aspect of the proposed Settlement Agreement and whether it would be appropriate to do so. After the Board commenced deliberations it directed the Board Secretary to send the following memo to the parties:

The Board is considering the settlement proposal put forward in the above matter. The Board notes that the settlement proposal contains an element that was not contained in the application, being the proposal of a margin which differs depending upon whether the Board calculates the weekly benchmark for regular grade gasoline using E-10 gasoline or conventional gasoline.

The Board invites any party who wishes to make a written submission regarding the appropriateness of having a margin for regular grade gasoline which differs depending upon the inputs used in setting the benchmark price, as well as the statutory authority which would permit having two margins.

The Board will consider any written submission received before 2 pm on Friday December 7, 2012.

The Board received responses to this request from several intervenors, including one from a representative of the Department of Energy and Mines. The Board notes that the representative filing the response is not the same individual who was in attendance to observe the proceedings on December 5.

In the Department's written submission it takes the position that "*it would be neither appropriate nor possible for the Board to apply a margin adjustment that is contingent upon the method by which the benchmark is determined.*"

On December 10, the Board received correspondence from counsel for the applicant replying to the submission from the Department of Energy and Mines and taking issue with the position advanced by the Department.

It is clear that there is a significant disagreement regarding the Board's authority to approve the proposed Settlement Agreement as well as the appropriateness of doing so. The Board will express no opinion on these subjects at this time. If a decision is required to resolve this disagreement, it should be made by the Board following a full evidentiary hearing.

The Department of Energy and Mines, a registered intervenor in this matter, took no position on the proposed Settlement Agreement at the hearing but now opposes it. While complete unanimity from all registered intervenors may not be a prerequisite to the approval of all settlement agreements, the position of the Department is not a frivolous one. In fact counsel for the applicant relied upon the lack of opposition from the Department at the hearing as support for the position that the proposed Settlement Agreement was appropriate.

Given the opposition of the Department of Energy and Mines; the Board, in the exercise of its discretion, will not approve the proposed Settlement Agreement.

The hearing of the application will proceed as scheduled on December 17 before a new panel of the Board, who shall not be informed of the terms of the proposed Settlement Agreement, excepting those which were placed on the public record. The applicant is directed to file its responses to the interrogatories on its rebuttal evidence no later than noon, Thursday December 13, 2012.

Dated at the City of Saint John, New Brunswick this 10th day of December, 2012.

Original Signed by

Cyril W. Johnston, Vice-Chairman

Original Signed by

Don Barnett, Member

Original Signed by

Roger McKenzie, Member